TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~420.~~ 185

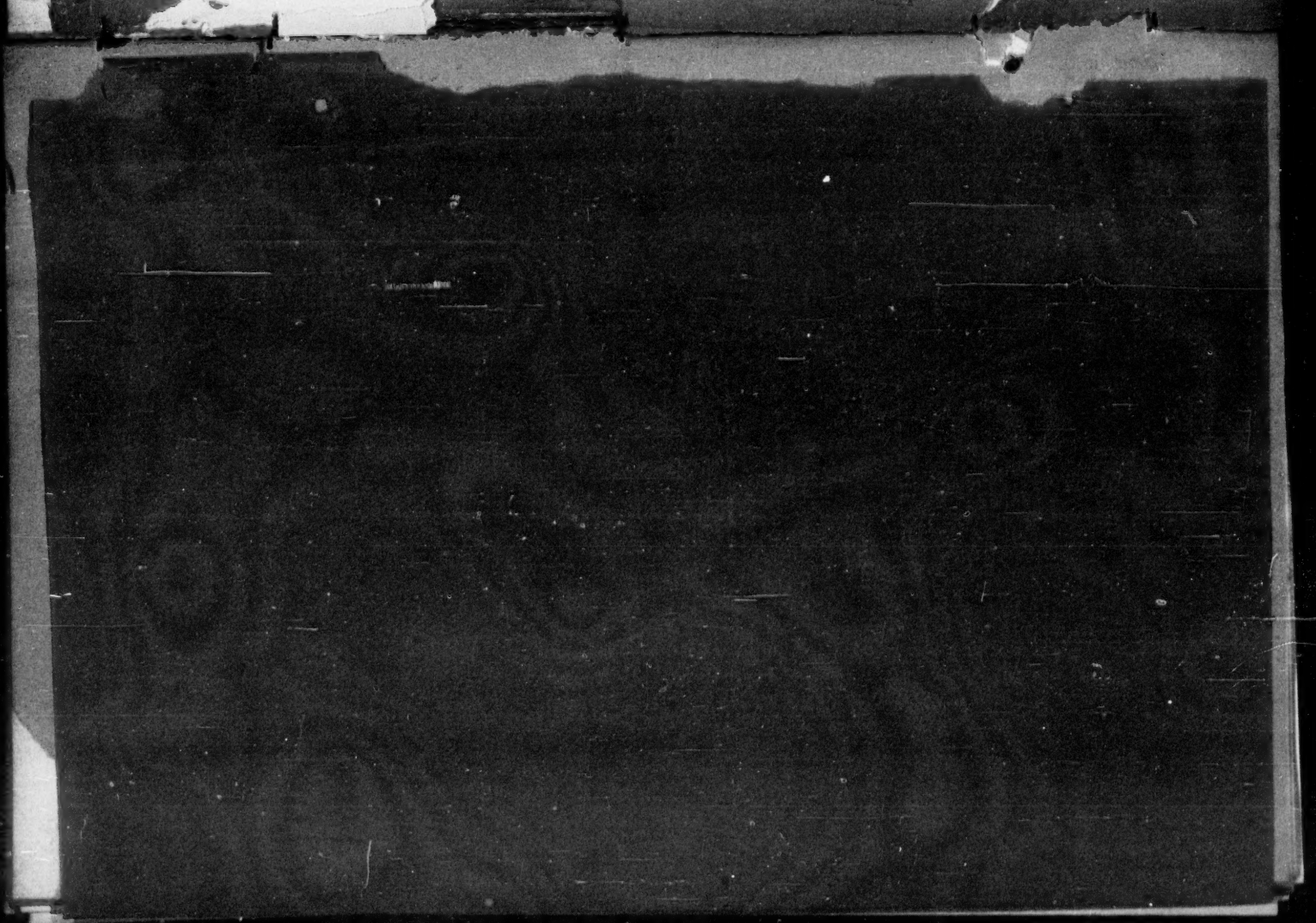
JOHN McK. GUNN, PLAINTIFF IN ERROR,

vs.

CHARLES F. BARRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED NOVEMBER 27, 1871.



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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the supreme court of the State of Georgia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of said State before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John McK. Gunn, plaintiff in error, and Charles F. Barry, defendant in error, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of
2 the United States, and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the said John McK. Gunn as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

JA'S McPHERSON,
Clerk of the Circuit Court of the United States for the So. Dist. of Georgia.

Allowed by—

O. A. LOCHRANE,
Ch'f Just. Supreme Court Geo.

3 UNITED STATES OF AMERICA,
State of Georgia:

To the Honorable O. A. Lochrane, chief justice of the supreme court of Georgia:

The petition of John McK. Gunn, who resides in said State, respectfully shows that, by bill of exceptions returnable to the July term, 1871, of the supreme court of said State, petitioner carried up for review by said court, a decision rendered by the superior court of Randolph County, in said State, in favor of the defendant, in the case of your petitioner vs. Charles F. Barry, sheriff of said county; the said case being an application for a mandamus commanding said sheriff to make a certain levy, with a certain fieri facias, in favor of petitioner, as will more fully appear in the record of said cause; and that the said supreme court being the highest court of law and equity in said State, on the day of August, 1871, affirmed the judgment of the court below, overruling petitioner's application for mandamus; which judgment of affirm-
4 ance is, unless set aside by the Supreme Court of the United States, final.

Petitioner further shows that the sole question on which said decision,

both in the court below and in the said supreme court of said State, depended, and which was presented by petitioner, was whether or not the act of the Georgia legislature, approved October 3rd, 1868, and entitled "An act to provide for setting apart a homestead of realty and personalty and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by section first of article seventh of the constitution, and for other purposes," in so far as the same exempts from levy and sale under a judgment a larger amount of property than was so exempt by the laws in force at the rendition of the judgment, or at the time of the creation of the debt whereon the judgment was based, is repugnant to the Constitution of the United States.

Your petitioner further shows that the said Georgia supreme court held said act to be consistent with the Constitution last aforesaid, and valid; which decision petitioner alleges to be erroneous, and that
5 it deprives him of the legal means, to which he is entitled under said constitution, for the enforcement of the judgment and fi. fa. in his favor, as set forth in the record, unless the honorable Supreme Court of the United States shall reverse the same.

Wherefore petitioner prays that your honor may be pleased to grant unto him a writ of error, returnable to the Supreme Court of the United States, on the first Monday in December next, on his giving such bond and security as the law requires, and as your honor shall approve.

This October 13th, 1871.

HOOD & KIDDOO AND
JOHN T. CLARKE,
Petitioner's Attorneys.

UNITED STATES OF AMERICA,
State of Georgia:

Upon considering the foregoing petition of John McK. Gunn for a writ of error returnable to the Supreme Court of the United States in his case vs. Charles F. Barry, lately determined in the supreme court of said State, and the said Gunn having filed with the clerk of the court last aforesaid a bond in terms of the law, by me approved, we, being
6 willing that the said cause may be reviewed by the honorable Supreme Court of the United States, do hereby direct that a writ of error in said cause do issue, returnable to the December term (first Monday in December next) of the said court.

Witness the official signature of me, O. A. Lochrane, chief justice of the supreme court of said State this Oct. 19, 1871.

O. A. LOCHRANE,
Chief Justice Supreme Court.

(Indorsed:) John McK. Gunn vs. Charles F. Barry. Petition for writ of error. Filed in office. Hood & Kiddoo, & John T. Clarke, petitioner's att'ys.

7 UNITED STATES OF AMERICA,
State of Georgia:

The President of the United States of America to Charles F. Barry, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the city of Washington, in the Territory of Columbia, on the first Monday of De-

cember next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, holding sessions at Atlanta, wherein John McK. Gunn is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf. Witness Chief Justice O. A. Lochrane, of the supreme court of Georgia.

Witness my hand and seal this the 19 day of Oct., A. D. 1871.

O. A. LOCHRANE,
Chief Justice Supreme Court of Georgia.

8 GEORGIA, *Randolph County:*

I acknowledge due and legal service of the within citation, and waive copy of it and all other papers necessary to be served on me, & the filing of all copies for my use necessary to give jurisdiction to Supreme Court U. S.

Oct. 30th, 1871.

CHA'S F. BARRY.

(Indorsed:) Supreme Court of the United States. December term, 1871. John McK. Gunn, pl'ff in error, vs. Charles F. Barry, def't in error. Citation. Hood & Kiddoo, and John T. Clarke, pl'ff's att'ys.

GEORGIA, *Fulton County:*

Before me, James M. Clark, a judge of the superior court in said State, came John T. Clarke, attorney of the plaintiff, and on oath saith the within citation was duly served on the defendant, Charles F. Barry, personally, Oct. 30, 1871, and that he, the defendant, made the above written acknowledgement of service and waiver, &c.

JOHN T. CLARKE.

Sworn to & subscribed before me this Nov. 2, 1871.

J. M. CLARK, *J. S. C. S. W. C.*

9 UNITED STATES OF AMERICA,
State of Georgia, Randolph County:

Know all men by these presents that we, John McK. Gunn, as principal, and Edward McDonald, as security, are held and firmly bound unto Charles F. Barry, in the sum of five hundred dollars, to be paid to the said Charles F. Barry, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this fourteenth day of October, in the year of our Lord eighteen hundred and seventy-one.

Whereas the above-named John McK. Gunn hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement rendered lately in the supreme court of the State of Georgia, in a suit pending in said court, wherein John McK. Gunn is plaintiff,
10 and Charles F. Barry is defendant, and *and* the said Charles F. Barry having been cited to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the above-named John McK. Gunn shall prosecute his said writ of error to effect,

and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JNO. McK. GUNN. [SEAL.]
E. McDONALD. [L. S.]

Bond approved.

O. A. LOCHRANE,
Chief Justice Supreme Court of Georgia.

11 STATE OF GEORGIA,
Randolph County:

Be it remembered that, at a superior court held in and for said county on the 8th of May, 1871, his honor David B. Harrell, judge of the Pataula circuit, presiding, there came on to be heard the case of John McK. Gunn vs. Charles F. Barry, sheriff of said county, the same being a petition for a mandamus commanding said sheriff to levy a certain fi. fa, in said petition described, in favor of petitioner vs. William R. Hart upon certain lands, in said petition described, in which petition it was represented that the said sheriff had persistently refused to make said levy, assigning as his only excuse for not doing so, that said lands had been set apart as a homestead to the family of the defendant in fi. fa, under the provisions of the act of the general assembly of this State, approved October 3d, 1868, entitled "An act to provide for setting apart a
12 homestead of realty and personalty, and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by sec. first of article seventh of the constitution, and for other purposes," which excuse petitioner insisted was invalid, on the ground that the said act of the legislature, so far as it applies to debts contracted, or judgements rendered prior to its enactment, and so far as it allowed a greater exemption from levy and sale than was allowed by the laws of force, at the rendition of the judgement or contraction of the debt, is void, as being in conflict with the Constitution of the United States.

Upon hearing said petition, the court overruled the same, and refused a mandamus nisi, on the ground that the excuse shown in the petition to be set up by the said sheriff for not making said levy, is a law-
13 ful and sufficient excuse; and that the law under which said homestead was set apart is valid; to which judgement the said petitioner, then and there excepted and, for assignment of error, says that the court erred in holding that the aforesaid act of the general assembly is not void for conflict with the Constitution of the United States, so far as it applies to the antecedent judgement of petitioner, and allows a larger exemption than was allowed by the laws in force at the rendition of said judgement.

And now, within thirty days from the adjournment of said court, comes the said petitioner, by his attorneys, Hood & Kiddoo and John T. Clarke, and, tendering this bill of exceptions, prays that the same may be certified in terms of the law, and, with a complete transcript of the record in said cause, sent up to the supreme court of said State, that the alleged errors may be reviewed.

JNO. T. CLARKE AND
HOOD & KIDDOO,
Att'ys for Pl'ff in Error.

14 GEORGIA, *Randolph County:*

I hereby certify that the foregoing bill of exceptions is true, and with the record, contains all the evidence material to a clear understanding of the alleged errors; and the clerk of said superior court is hereby ordered to make out a complete transcript of the record in said cause, and the same to certify as such, and send up with this bill of exceptions to the supreme court to be held in Atlanta on the first Monday in July next, that the alleged errors may be reviewed.

May 31, 1871.

DAVID B. HARRELL,
J. S. C. P. C.

GEORGIA, RANDLPH COUNTY,
Clerk's Office, Superior Court:

I certify this to be the original bill of exceptions of file in this case. Given under my hand officially & the seal of said court this June 6, 1871.

M. C. PARKERSON, *Clk.*

Service acknowledged and copy waived, June 2, 1871.

CHA'S F. BARRY, *Sh'ff.*

15 STATE OF GEORGIA,
Randolph County:

To the Honorable David B. Harrell, judge of the superior courts of the Pataula circuit, exercising equity jurisdiction therein.

The petition of John McK. Gunn showeth that, being the owner of a certain fieri facias issued in his favor against William R. Hart, (a copy of which, with the entries thereon, is hereto attached,) returnable to the November term, 1866, of the superior court for said county of Randolph, from a judgement recovered at the May term of the year aforesaid, of said superior court, for the sum of four hundred and two dollars and thirty cents, principal; one hundred and twenty-five dollars and sixty cents, interest to date of judgement; and eighteen dollars and seventy-five cents, costs, which said costs have been paid by defendant in fieri facias, he, on the 24th day of April, 1871, placed the same in the hands of Charles F. Barry, of said county, who was at that time and
16 now is the duly-qualified sheriff of said county of Randolph, and then and there instructed the said sheriff to levy the said fieri facias on lot of land number twenty-five, (25,) fifty-five acres off of south end of lot of land number twenty-six, and fifteen acres off of northwest corner of lot of land number twenty-four—all in the 19th dist. of, originally Lee (now Randolph) County, and containing two hundred and seventy-two and a half acres. Whereupon the said Charles F. Barry, sheriff as aforesaid, then and there refused and still refuses to levy said fi. fa. on said tract of land, giving as his only reason therefor that said lands had been set apart as a homestead to the family of the said William R. Hart by virtue of the act of the general assembly, approved the 3d day of October, 1868, entitled, "An act to provide for setting apart a homestead of realty and personalty, and for the valuation of the said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as re-
17 quired by section 1st of art. 7th of the constitution, and for other purposes."

Your petitioner represents that the tract of land hereinbefore described is the only property known to him to be subject to the lien of said judgement, except twenty-eight acres of land, of the value of one hundred dollars, in the county of Stewart, which is also included in said homestead so set apart, and said tract is worth the sum of thirteen hundred dollars, a much larger number of acres than the real estate exempt from levy and sale by the laws in force at the time the judgement afor'said was recovered, and the debt on which it was founded was contracted, and that the reason given by the said sheriff for refusing to levy said fieri facias on said land and proceed to sell the same, is insufficient, because the aforesaid act, approved the 3d day of October, 1868, in so far as it applies to debts contracted and judgements recovered
18 prior to its passage, is contrary to the Constitution of the United States, and, therefore, void. Wherefore your petitioner prays the writ of mandamus may be granted by your honor to compel the said Charles F. Barry, as sheriff as afor'said, to levy the said fieri facias on said land, and proceed to sell the same. And he will ever pray, &c.

JOHN T. CLARKE,
HOOD & KIDDOO,
Petitioner's Att'ys.

GEORGIA, *Randolph County:*

In person, John McK. Gunn, being duly sworn, says the statements made in the foregoing petition are true.

J. McK. GUNN.

Sworn to and subscribed before me this 26 Ap'il, 1871.

A. HOOD,
Not. Pub. Randolph County.

19 GEORGIA, *Randolph County:*

To all and singular the sheriffs and their lawful deputies of said State, greeting:

We command you that, of the goods and chattels, lands and tenements, of William R. Hart, you cause to be made the sum of four hundred and two dollars and thirty cents, principal, and the further sum of one hundred and twenty-nine dollars and sixty cents, interest up to the 12th day of May, 1866; and also the further sum of eleven dollars and seventy-five cents, for costs, with interest on the principal sum from the 12th day of May, 1866, which John McK. Gunn, lately in our superior court for said county, recovered against William R. Hart, for principal, interest, and costs; and that you have the said several sums of money before the judge of said court on the first Monday in November next, to render to the said John McK. Gunn, for principal, interest, and costs aforesaid; and have you then and there this writ.

20 Witness the Honorable John T. Clarke, judge of said court, this 17th day of May, 1866.

JOSEPH L. VARNER,
Dep. Cl'k.

Received of W. R. Hart cost on within fi. fa. Feb'y 29th, 1868.

E. S. BROOKS,
Dep. Sh'ff.

Fi. fa. No. 28. May term, 1866. Superior court of Randolph County. John McK. Gunn vs. William R. Hart. Principal, $402.30; int., $129.60. Jury, 3.00; rev., 50; cl'k, $6.25; sheriff, 2.00—$11.25.

JOHN MCK. GUNN
vs.
WILLIAM R. HART.

Fi. fa. from Randolph superior court, May term, 1866. Principal, $402.30; interest, $129.60; costs, $11.75.

GEORGIA, *Randolph County:*

In person appeared John McK. Gunn, owner of the above-stated fieri facias, being sworn, says that all legal taxes charg'able by law by him on said debt have been duly paid, from the time of making or
21 implying of the contract, the foundation of the suit and judgement from which said fi. fa. issued, until this date.

J. McK. GUNN.

Sworn to and subscribed before me this 24 April, 1871.

M. GORMLY, *Ordinary.*

Randolph superior court, May term, 1871.

Upon reading and considering the foregoing petition of John McK. Gunn, for a mandamus against Charles F. Barry, sheriff, it is ordered by the court that the mandamus nisi be refused, on the ground that the excuse shown in the petition set up by the said sheriff for not making said levy is a lawful and sufficient excuse, and the law under which said homestead was set apart is valid.

Witness my hand and official signature this May 8, 1871.

DAVID B. HARRELL,
J. S. C. P. C.

22 A true extract from the minutes of court. June 6th, 1871.

M. C. PARKERSON, *Clerk.*

GEORGIA, RANDOLPH COUNTY,
Clerk's Office Superior Court:

I hereby certify that the foregoing is a true, correct, and complete transcript of the record in said case.

Given under my hand officially and the seal of said court, this June 6, 1871.

M. C. PARKERSON, *Clerk.*

Filed in office June 13, 1871.

Z. D. HARRISON, *Clerk.*

23 Supreme court of the State of Georgia.

ATLANTA, GA., *August 15th*, 1871.

The honorable supreme court met pursuant to adjournment—present, their honors O. A. Lochrane, chief justice; H. K. McCay and Hiram Warner, associates.

JOHN MCK. GUNN, PL'FF IN ERROR,
vs.
CHARLES F. BARRY, SH'FF, DEF'T IN ERROR.

This case came before the court upon a transcript of the record from the superior court of Randolph County, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

McCay, J., dissenting.

24

CLERK'S OFFICE
SUPREME COURT OF THE STATE OF GEORGIA,
Atlanta, Ga., Nov'r 3d, 1871.

I, Z. D. Harrison, clerk of said supreme court, do certify that the foregoing pages contain the original petition for writ of error, the writ of error, and citation, with service endorsed thereon, and a copy of the bond in the case of John McK. Gunn, pl'ff in error, vs. Charles F. Barry, sh'ff, def't in error; and also a complete transcript of the record of said case now of file in this office, and of the judgment of said supreme court in said case.

Witness my signature and the seal of said supreme court affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

(Indorsement on cover:) No. 420. John McK. Gunn, plaintiff in error, vs. Charles F. Barry. Georgia sup. court. Filed 27 November, 1871.